ORIGINAL

CASE NO. 87-6116

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

STEVEN ANTHONY PENSON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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COUNSEL FOR PETITIONER

QUESTION PRESENTED:

I. DOES A DEFENDANT WHO CLAIMS THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL HAVE THE BURDEN OF ESTABLISHING HIS CLAIM BY POINTING TO SPECIFIC ERRORS OR OMISSIONS MADE BY HIS APPELLATE COUNSEL WHICH SHOW, IN LIGHT OF ALL THE CIRCUMSTANCES, THAT HIS APPELLATE COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND WHICH ALSO ESTABLISH A REASONABLE PROBABILITY THAT, BUT FOR HIS APPELLATE COUNSEL'S UNPROFESSIONAL ERRORS, HIS CONVICTION WOULD HAVE BEEN REVERSED ON APPEAL?

Respondent submits that this question should be answered in the affirmative.

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In The

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STATEMENT OF THE CASE

On August 10, 1984, Petitioner was indicted by the Montgomery County Grand Jury on one (1) count of Rape, pursuant to R.C. 2907.02 (A)(1), with a firearm specification, pursuant to R.C. 2929.71 and 2941.141 (Docket Entry #1). On August 14, 1984, the grand jury indicted Petitioner on twenty (20) additional counts of Rape, each count containing a firearm specification; one (1) count of Aggravated Burglary, pursuant to R.C. 2911.11 (A)(3), with a firearm specification; two (2) counts of Aggravated Robbery, pursuant to R.C. 2911.01 (A)(1), each count containing a firearm specification; two (2) counts of Felonious Assault, pursuant to R.C. 2903.11 (A)(2), each count containing a firearm specification; one (1) count of Felonious Sexual Penetration, pursuant to R.C. 2907.12 (A)(1) and

2923.02, with a firearm specification; and one (1) count of Gross Sexual Imposition, pursuant to R.C. 2907.05 (A)(1), with a firearm specification (Docket Entry #3). On August 21, 1984, the grand jury added prior aggravated felony conviction specifications to each count of Petitioner's previous indictments and further indicted Petitioner on one count of Having Weapons While Under Disability, in violation of R.C. 2923.13 (A)(2), with said count containing a firearm specification and a prior aggravated felony conviction specification (Docket Entry #10). Petitioner was tried jointly with co-defendants John A. Smith, Jr. and Richard Brooks, before a jury on November 26 through December 5, 1984. On December 7, 1984, the jury returned verdicts finding Petitioner guilty on fourteen counts of Rape (Count One, Counts Ten through Seventeen, and Counts Twenty-Two through Twenty-Six) with firearm specifications on each count; guilty of Aggravated Burglary (Count Two) with a firearm specification; guilty of two counts of Aggravated Robbery (Counts Three and Four) with firearm specifications on each count; guilty of two counts of Felonious Assault (Counts Five and Six) with firearm specifications on each count; guilty of Attempted Rape (Count Eight) with a firearm specification; guilty of Gross Sexual Imposition (Count Nine) with a firearm specification; and guilty of Having Weapons While Under Disability (Count Twenty-Nine) with a firearm specification. Except for Counts Five and Six, each count of which Petitioner was convicted contained a finding that he had previously been convicted of Felonious Assault (Docket Entry #24).

On December 27, 1984, the trial court filed an entry and order sentencing Petitioner to Chillicothe Correctional Institute for a term of not less than fifteen (15) years nor more than twenty-five (25) years on counts one through four, ten through seventeen and twenty-two through twenty-six; not less than twelve (12) years nor more than fifteen (15) years on counts five, six and eight; and not less than three (3) years nor more than five (5) years on count twenty-nine. On Count Two there is an additional term of three (3) years actual incarceration for the firearm specification, which shall be served consecutively with, and prior to, all other terms of imprisonment. All other sentences are to be served concurrently with each other and all sentences are to be served consecutively with the sentence imposed in Case No. 84-CR-1056. An amended entry and order was filed on January 9, 1985 to state that all sentences pertaining to the rape counts were to be served as actual incarceration. (Docket Entries #28 and #30).

Petitioner timely filed his Notice of Appeal from his judgment and sentence (Docket Entries #31 and #32). Petitioner's appellate counsel filed an Anders brief in the Montgomery County Court of Appeals on June 2, 1986, stating that there were no meritorious issues to be raised on appeal. On June 9, 1986, Douglas Shaeffer was permitted to withdraw as appellate counsel for Petitioner and the Petitioner was allowed 30 days to file his own brief. Although several extensions of time were granted allowing Petitioner additional time to file his brief, no brief was ever filed.

After reviewing and deciding the appeals filed by co-defendants Richard Brooks, unreported, Montgomery App. No. 9190 (June 4, 1987) and John A. Smith, Jr., unreported, Montgomery App. No. 9168 (May 13, 1987), the Montgomery County Court of Appeals, pursuant to its duties under Anders v. California, 386 U.S. 738 (1967), undertook a full examination of the record to determine whether the Petitioner received a fair trial and whether any grave or prejudicial errors occurred during the trial. The Court of Appeals stated in its Opinion that the record did support several arguable claims which were fully considered in the appeals of the co-defendants, Brooks and Smith. State v. Steven Anthony Person, unreported, Montgomery App. No. 9193, (June 5, 1987), Slip Opinion at p. 5. Based upon its review of the record and consideration of the issues raised in the appeals of the co-defendants, the Court of Appeals reversed Petitioner's conviction for Felonious Assault as charged in Count Six of the indictment and affirmed his conviction on the other counts (See Appendix "B" hereto).

Petitioner filed his Notice of Appeal to the Ohio Supreme Court on July 6, 1987. On October 21, 1987, the Ohio Supreme Court filed an Entry dismissing Petitioner's appeal for want of a substantial constitutional question (Appendix "A" hereto).

REASONS WHY THE WRIT
OF CERTIORARI SHOULD NOT BE GRANTED:

I. THE PETITIONER CANNOT ESTABLISH HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL WHERE HE HAS FAILED TO POINT TO SPECIFIC ERRORS OR OMISSIONS MADE BY HIS APPELLATE COUNSEL WHICH SHOW, IN LIGHT OF ALL THE CIRCUMSTANCES, THAT HIS APPELLATE COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND WHICH ESTABLISH A REASONABLE PROBABILITY THAT, BUT FOR HIS APPELLATE COUNSEL'S UNPROFESSIONAL ERRORS, HIS CONVICTION WOULD HAVE BEEN REVERSED ON APPEAL.

The Petitioner argues that he was denied the effective assistance of counsel on direct appeal because his appellate counsel failed to strictly comply with the requirements set forth by this Honorable Court in Anders v. California, 386 U.S. 738 (1967). Petitioner further argues that his appellate counsel's failure to file a brief constituted a constructive denial of counsel with the result that prejudice need not be shown.

In United States v. Cronic, 466 U.S. 648 (1984), this Honorable Court noted that some situations do exist where prejudice need not be shown by an accused, the most obvious of which being the complete denial of counsel or the denial of counsel at a critical stage of trial. Id., at p. 658-59 and n.25. This Court cited Davis v. Alaska, 415 U.S. 308 (1974), where the accused was denied the right to effective cross-examination, and Powell v. Alabama, 287 U.S. 45 (1932), "a case in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial," as being representative of situations where prejudice need not be proven by the defendant. Id., at p. 659-61. But this Court also went on to state that "[a]part from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. See Strickland v. Washington, 466 U.S. at 693-696, 104 S.Ct. at 2067-2069." Id., at p. 659-60, n.26 (Emphasis added; citations omitted). This Court also noted that, in the absence of extraordinary circumstances such as those found in the Davis and Powell cases, in its evaluation of ineffective assistance of counsel claims:

> [W]e begin by recognizing that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated. Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, the burden rests on the accused to demonstrate a constitutional violation.

Id., at p. 658 (Emphasis added; citations and footnotes omitted).

Clearly, due process of law entitled the Petitioner to the effective assistance of counsel on a first appeal as of right. Evitts v. Lucy, 469 U.S. 387, 396 (1985). Just as clearly, however, Petitioner was not entitled to compel his court appointed appellate counsel to press nonfrivolous points requested by Petitioner when counsel, as a matter of professional judgment, decided not to press those points. Jones v. Barnes, 463 U.S. 745, 751 (1983). In the instant case Petitioner's court appointed appellate counsel clearly did, according to his Certificate of Meritless Appeal (Appendix C), conduct a careful examination of the record on appeal and found no errors justifying reversal or modification of Petitioner's conviction and sentence. In light of the foregoing, Respondent respectfully submits that it is clear that Petitioner's court appointed appellate counsel did render some representation to Petitioner, and thus the real issue in the instant cause involves the effectiveness of the representation rendered by Petitioner's court appointed appellate counsel, and not whether Petitioner was represented by counsel at all.

In Evitts v. Lucy, supra, this Court noted that the district court's finding that the petitioner received ineffective assistance of counsel on appeal was uncontested by the parties. Thus, this Court found it unnecessary to "decide the content of appropriate standards for judging claims of ineffective assistance of appellate counsel." Id. at p. 392. However, in Smith v. Murray, ___ U.S. ___, 106 S. Ct. 2661 (1986), this Court applied the test of Strickland v. Washington, 466 U.S. 668 (1984), to a claim involving the ineffective assistance of appellate counsel. In Smith v. Murray, supra, this Court held that the habeas corpus petitioner had defaulted his underlying constitutional claim as to the admission of a psychiatrist's testimony at the sentencing phase of his capital murder trial since his appellate counsel had not raised the issue on direct appeal as required by Virginia law. This Court stated: "Nor can it seriously be maintained that the

decision not to press the claim on appeal was an error of such magnitude that it rendered counsel's performance constitutionally deficient under the test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984)". Smith, supra at p. 2667. This Court then went on to elaborate:

> It will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule. But, as Strickland v. Washington made clear, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S., at 689, 104 S.Ct., at 2065. Viewed in light of Virginia law at the time Mr. Pugh submitted his opening brief to the Supreme Court of Virginia, the decision not to pursue his objection to the admission of Dr. Piles' testimony fell well within the "wide range of professionally competent assistance" required under the Sixth Amendment to the Federal Constitution. Id., at 690, 104 S.Ct., at 2066.
>
> Id., at p. 2667.

Thus, Respondent would respectfully submit that the Strickland test for evaluating claims involving the effectiveness of counsel at the trial stage applies equally to claims involving the effectiveness of counsel on a first appeal as of right. In Strickland v. Washington, supra, this Court held that where a convicted defendant claims that his trial counsel's performance was so deficient as to require reversal of his conviction, he must first show that, in light of all the circumstances, counsel's performance fell below an objective standard of reasonableness. 466 U.S. at 687-88. In this particular regard, the Court noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. In addition, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 689-94. Thus, under Strickland, the test for ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice, the same as in Ohio under State v. Lytle, 48 Ohio St. 2d 391 (1976).

Under the Strickland test, Petitioner has clearly failed to demonstrate that he was prejudiced by the manner in which his first appeal as of right was handled. Noticeably absent from Petitioner's Petition for a Writ of Certiorari is even an attempt by Petitioner to point to any error in the trial record which, but for

appellate counsel's failure to raise said, would have resulted in a reasonable probability that the outcome of the proceeding (i.e. appeal) would have been otherwise (i.e. Petitioner's conviction would have been reversed). Even assuming for the sake of argument that appointed appellate counsel's failure to strictly comply with the dictates of Anders v. California, supra, amounts to a violation of an essential duty (i.e. deficient performance), Respondent nevertheless posits that Petitioner's failure to demonstrate any resulting prejudice clearly precludes a finding of ineffective assistance of counsel under the prevailing Strickland standard.

CONCLUSION

The proper standard for evaluating the effectiveness of assistance provided by appellate counsel is undeniably the test set forth by this Honorable Court in Strickland v. Washington, 466 U.S. 668 (1984). See: Smith v. Murray, ___U.S.___, 106 S.Ct. 2661 (1986). Under the Strickland test for judging the effectiveness of counsel, the instant Petitioner has clearly failed to meet the prejudice prong. Therefore, Petitioner has not met his burden in demonstrating ineffective assistance of appellate counsel and hence Petitioner has not demonstrated the existence of a constitutional violation under the Sixth and Fourteenth Amendments to the United States Constitution. Thus, this Honorable Court should deny Petitioner's request for a Writ of Certiorari.

Respectfully submitted,

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Prosecuting Attorney for
Montgomery County, Ohio

By _____
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COUNSEL FOR RESPONDENT

APPENDIX:

A) Ohio Supreme Court Entry - State v. Penson, October 21, 1987

B) Ohio Court of Appeals Decision - State v. Penson (1987), unreported, Montgomery County Court of Appeals Case No. 9193

C) Certificate of Meritless Appeal filed by Petitioner's court appointed appellate counsel in the Ohio Court of Appeals

D) Ohio Court of Appeals Decision - State v. Brooks (1987), unreported, Montgomery County Court of Appeals Case No. 9190

E) Ohio Court of Appeals Decision - State v. Smith (1987), unreported, Montgomery County Court of Appeals Case No. 9168

APPENDIX "A"

The Supreme Court of Ohio

Columbus

1987 TERM

To wit: October 21, 1987

State of Ohio, Appellee,	:	
	:	Case No. 87-1341
v.	:	E N T R Y
Steven A. Penson, Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Montgomery County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, Affidavit of Poverty filed.

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 21st day of October, 1987.

MARCIA J. MENGEL CLERK

DEPUTY

APPENDIX "B"

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	
vs.	:	CASE NO. 9193
STEVEN ANTHONY PENSON	:	(C.P. #84-CR-1401)
Defendant-Appellant	:	

.....

O P I N I O N

Rendered on the 5th day of June, 1987

.....

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DOUGLAS R. SHAEFFER, P.O. Box 593, Dayton, Ohio 45420

STEVEN ANTHONY PENSON, K-3-56, #182582, P.O. Box 45699,
Lucasville, Ohio 45699-0001
Defendant-Appellant

.....

PER CURIAM:

On August 4, 1984 James Jones, his wife, Deborah Jones and their two sons were residing at 1947 Fairport Avenue Apartment 104 in Montgomery County. Also living at that address was James' sister, Mary Jones and her son.

Sometime after 12:30 a.m. that morning, Steve Penson broke through the bedroom window of the apartment wielding a pistol. Penson demanded money and began searching James' jacket. At the same time, two other men, identified as Richard Brooks and

John Albert Smith, Jr. kicked in the front door of the apartment and came inside. Over the course of approximately the next one to two and one-half hours the men sexually assaulted, sodomized, and brutalized the adult residents. Before leaving, the men also took several items from the apartment. Brooks was told to kill Deborah and James but, was unable to do so and left the apartment after telling them to count to 2000.

After the assailants left, James Jones went upstairs to a neighbor's apartment and called the police. The parties were thereafter taken to Good Samaritan Hospital for medical treatment.

On August 10, 1984, the Montgomery County Grand Jury indicted defendant Penson on one count of rape, with a firearm specification. On August 14, 1984 defendant was indicted on twenty additional counts of rape; one count of aggravated burglary; two counts of aggravated robbery; two counts of felonious assault; one count of felonious sexual penetration; and one count of gross sexual imposition. Each of the above counts contained a firearm specification and a specification that defendant had been previously convicted in the State of Ohio of felonious assault.

Defendant was tried jointly with co-defendants Smith and Brooks before a jury on November 26 through December 5, 1984. On December 7, 1984, the jury returned verdicts finding defendant guilty on fourteen counts of Rape (Count One, Counts

Ten through Seventeen, and Counts Twenty-Two through Twenty-Six) with firearm specifications on each count; guilty of Aggravated Burglary (Count Two) with a firearm specification; guilty of two counts of Aggravated Robbery (Counts Three and Four) with firearm specifications on each count; guilty of two counts of Felonious Assault (Counts Five and Six) with firearm specifications on each count; guilty of Attempted Rape (Count Eight) with a firearm specification; guilty of Gross Sexual Imposition (Count Nine) with a firearm specification; and guilty of having a firearm under a disability (Count twenty-nine).

On December 27, 1984 the trial court filed an entry and order sentencing defendant to Chillicothe Correctional Institute for a term of not less than fifteen (15) years nor more than twenty-five (25) years on counts one through four, ten through seventeen and twenty-two through twenty-six, not less than twelve (12) years nor more than fifteen (15) years on Counts Five, Six and Eight and not less than Three (3) years nor more than five (5) years on Count Twenty-Nine. On Count Two there is an additional term of three (3) years actual incarceration for the Firearm specification, which shall be served consecutively with, and prior to, all other terms of imprisonment. All other sentences are to be served concurrently with each other; said sentences to be served consecutively with the sentence imposed in 84 CR 1056, an amended entry and order was filed on January 9, 1985 to state

that all sentences pertaining to the rape counts were to be actual incarceration.

Defendant-appellant filed a timely notice of appeal from the judgment and sentence imposed thereon. On June 2, 1986, appellant's counsel filed an Anders brief stating there was no meritorious issues to be considered on appeal. By decision and entry dated June 9, 1986 this court allowed Douglas Shaeffer to withdraw as counsel and granted appellant 30 days to file his own brief. Appellant was granted an extension on June 27, 1986. On July 24, 1986 appellant's request for the loan of the trial transcript was granted and he was given an additional 60 days to complete his brief. Another extension of 60 days was granted by entry dated September 15, 1986. On November 13, 1986 this court overruled appellant's request for the appointment of new counsel and granted appellant 15 more days to use the transcript. A final extension of 25 days was granted in which appellant was to file the brief. No brief was ever filed in the above captioned case.

Pursuant to our duties under Anders v. California (1967), 386 U.S. 738, this court must undertake a full examination of the record to determine whether the defendant was accorded a fair trial and whether any grave or prejudicial errors occurred therein. See also, State v. Toney (1970), 23 Ohio App. 2d 203.

Initially, this court is troubled by the filing of an Anders brief in the present action. We find counsel's claim that the record does not reveal any assignment of error which

could arguably support the appeal to be highly questionable. We reach this conclusion in light of our examination of the considerable briefs filed by co-defendants' Brooks and Smith's counsel in their respective appeals. Because we have thoroughly examined the record and already considered the assignments of error raised in the other defendants' appeals, we find appellant has suffered no prejudice in his counsel's failure to give a more conscientious examination of the record.

The record of the trial court does support several arguable claims. Our full consideration of each may be examined in the decisions rendered in the companion defendants' appeals. See, State v. John A. Smith (May 13, 1987) Montgomery App. No. 9168, unreported and State v. Richard Brooks (June 4, 1987) Montgomery App. No. 9190, unreported.

In examining the record, we find one issue which requires our attention. The problem involves the trial court's failure to instruct the jury on an element of felonious assault. Appellant was charged in counts five and six with having knowingly caused physical harm to James and Deborah Jones by means of a deadly weapon. The trial court neglected to include the deadly weapon portion of the charge.

However, appellant's counsel failed to object to the charge as given. Absent plain error, the failure to object constitutes a waiver. State v. Underwood (1983), 3 Ohio St. 3d 12. Generally, failure to separately and specifically instruct on every essential element of the crime charged is not per se

plain error. State v. Adams (1980), 62 Ohio St. 3d 151. A reviewing court must examine the record to determine the probable impact of the court's failure to charge an element of the offense and consider whether substantial prejudice may have been visited on the defendant. Id. at 154.

With regard to count five involving James Jones, the state introduced the testimony of several witnesses to demonstrate that he had suffered physical harm as a result of being hit with the gun. James testified that appellant and Steve Penson hit him repeatedly with the pistol about the head and body. (Tr. 208, 211, 212, 214). Deborah Jones testified that she saw James being hit with the gun and that he was bleeding from the head. (Tr. 490, 492). Dr. Terraro testified that James had multiple lacerations on his head and face which required 36 stitches. (Tr. 458). He stated that the injuries were consistent with James' claim that he had been beaten with a gun. (Tr. 458).

The appellant presented no evidence to contradict or refute the testimony inasmuch as the theory of defense presented by all of the defendants was that they were not the persons who committed the acts. In finding appellant guilty on count six, the jury necessarily rejected the proffered defense and believed beyond a reasonable doubt that appellant caused physical harm to James Jones by means of a deadly weapon. We cannot find that, except for the error, the outcome of the jury's decision on this count clearly would have been otherwise.

With regard to count six concerning Deborah Jones, the record is devoid of any evidence that she suffered physical harm by means of a deadly weapon. The only two references in the record which lend any support to the felonious assault charge are at pages 489 and 494 of the transcript,

> A. Yes. He had a gun up to my head now and I was sitting on top of the fat one.
>
> OK, well, he came back and then he had the gun to my head and he had his penis in my butt and the other one had his penis in my vagina at the same time and -- (crying)
>
> . . .
>
> Q. Were you face up or face down?
>
> A. No, I was laying sideways cause I could feel the pressure of the gun through the pillow, like in my face.

This evidence alone, as a matter of law, was insufficient to support the finding that appellant committed felonious assault against Ms. Jones. The outcome of the trial may clearly have been different had the court properly charged the jury. Accordingly, we must reverse appellant's conviction and vacate the sentence imposed on count six of the indictment. As modified, the judgment of the trial court is affirmed.

.....

WILSON, J., BROGAN, J., and FAIN, J., concur.

Copies mailed to:

Mark B. Robinette
Douglas R. Shaeffer
Steven Anthony Penson
Hon. W. Erwin Kilpatrick

APPENDIX "C"

COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO
SECOND APPELLATE DISTRICT

State of Ohio, Case No. 9190

Appellee,

vs.

Steven Anthony Penson MOTION

Appellant.

* * * * *

CERTIFICATION OF MERITLESS APPEAL

Appellant's attorney respectfully certifies to the Court that he has carefully reviewed the within record on appeal, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1056, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1401, and that he will not file a meritless appeal in this matter.

MOTION

Appellant's attorney respectfully requests a Journal Entry permitting him to withdraw as appellant's appellate attorney of record in this appeal thereby relieving appellant's attorney of any further responsibility to prosecute this appeal with the attorney/client relationship terminated effective on the date file-stamped on this Motion.

CERTIFICATION OF SERVICE

On June 2, 1986, I served this document by Ordinary Mail Service upon:

Mr. Ted Millspaugh
Prosecutor's Office
308 Mont. Co. Cts. Bldg.
41 North Perry Street
Dayton OH 45402

Mr. Steven Anthony Penson
K-3-56 #182582
P.O. BOX 45699
Lucasville OH 45699-0001

RESPECTFULLY SUBMITTED

Douglas R. Shaeffer 513/434-7667
Appellant's Attorney
1404 Beaverton Drive Suite 200
Kettering OH 45429

APPENDIX "D"

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

vs. : CASE NO. 9190

RICHARD BROOKS :

Defendant-Appellant :

.....

OPINION

Rendered on the 4th day of June, 1987

.....

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Attorney for Plaintiff-Appellee

D.K. WEHNER of HUNT, SKILKEN & WEHNER, 2040 First National Plaza, Dayton, Ohio 45402
Attorney for Defendant-Appellant

.....

BROGAN, J.

On August 4, 1984 James Jones, his wife, Deborah Jones and their two sons were residing at 1947 Fairport Avenue Apartment 104 in Montgomery County. Also living at that address was James' sister, Mary Jones and her son.

Sometime after 12:30 a.m. that morning, Steve Penson broke through the bedroom window of the apartment wielding a pistol. Penson demanded money and began searching James' jacket. At the same time, two other men, identified as Richard Brooks and John Albert Smith, Jr. kicked in the front door of the

apartment and came inside. Over the course of approximately the next one to two and one-half hours the men sexually assaulted, sodomized, and brutalized the adult residents. Before leaving, the men also took several items from the apartment, including $200 worth of food stamps. Brooks was told to kill Deborah and James but, was unable to do so and left the apartment after telling them to count to 2000.

After the assailants left, James Jones went upstairs to a neighbor's apartment and called the police. The parties were thereafter taken to Good Samaritan Hospital for medical treatment.

On August 10, 1984, the Montgomery County Grand Jury indicted defendant Brooks on one count of rape, with a firearm specification. On August 14, 1984 defendant was indicted on twenty additional counts of rape; one count of aggravated burglary; two counts of aggravated robbery; two counts of felonious assault; one count of felonious sexual penetration; and one count of gross sexual imposition. Each of the above counts contained a firearm specification.

Defendant was tried jointly with co-defendants Penson and Smith before a jury on November 26 through December 5, 1984. On December 7, 1984, the jury returned verdicts finding defendant guilty on fourteen counts of Rape (Count One, Counts Ten through Seventeen, and Counts Twenty-Two through Twenty-Six) with firearm specifications on each count; guilty of Aggravated Burglary (Count Two) with a firearm specification;

guilty of two counts of Aggravated Robbery (Counts Three and Four) with firearm specifications on each count; guilty of two counts of Felonious Assault (Counts Five and Six) with firearm specifications on each count; guilty of Attempted Rape (Count Eight) with a firearm specification; and guilty of Gross Sexual Imposition (Count Nine) with a firearm specification. On December 27, 1984, the trial court filed an Entry and Order sentencing defendant to the Chillicothe Correctional Institute for a term of 10 to 25 years on Counts One though Four, Counts Ten through Seventeen, and Counts Twenty-Two through Twenty-Six, to be served concurrently with each other; with an additional term of 3 years actual incarceration on Count Two for the firearm specification; a term of 5 to 15 years on Counts Five and Six to be served concurrently with each other and consecutively with Count Two; a term of 8 to 15 years on Count Eight to be served concurrently with all other counts; and a term of 18 months on Count Nine to be served concurrently with all other counts. All sentences pertaining to the rape offenses were designated as actual incarceration and the 3 year term of actual incarceration for the firearm specification was ordered to be served consecutively with and prior to all other terms of imprisonment.

Defendant-Appellant filed a timely notice of appeal from the judgment and sentence imposed thereon. Appellant asserts six assignments of error on appeal.

I. THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN OVERRULING HIS PRETRIAL MOTION FOR SEVERANCE OF DEFENDANTS.

Appellant contends the court erred in failing to grant the motion for separate trials. The motion to sever claimed that the overwhelming evidence against one of the defendants would have a spillover effect and make it impossible for appellant to receive a fair trial.

Revised Code Section 2945.13 provides,

> When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly unless the court, for good cause shown on application therefor by the prosecuting attorney or one or more of said defendants, orders one or more of said defendants to be tried separately.

Crim. R. 14 provides in part,

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires.

The burden is upon the applicant seeking a separate trial to show good cause why a separate trial should be granted. State v. Perod (1968), 15 Ohio App. 2d 115. The granting or denial of such separate trial rests within the sound discretion of the trial court. State v. Dingus (1970), 26 Ohio App. 2d 131. Mere hostility between defendants is not enough to necessitate separate trials. State v. Morris (Sept. 29, 1982), Lorain App. No. 3332, unreported. In deciding whether to grant a

severance, the trial judge must balance the possible prejudice to the defendant against the government's interest in judicial economy and must consider ways which the prejudice can be lessened by other means. United States v. Garza (C.A. 5, 1977), 562 F. 2d 1164.

Appellant contends that several factors were pertinent to the issue of severance and clearly demonstrated the resulting prejudice. First co-defendant Penson was charged with having a weapon under disability which necessitated the introduction of evidence against Penson of a prior criminal record of a violent felony which would taint appellant by association; second that co-defendant Penson's fingerprints had been found at the crime scene but appellant's had not; third that one of the complaining witnesses knew co-defendant Penson prior to the crime events as they had served together at the "workhouse", which again implicated Penson as a known criminal; and fourth that one of the three complaining witnesses failed to identify appellant. (Tr. 31).

Appellant cites United States v. Kelley (2d Cir. 1965), 349 F. 2d 720 in support of his argument. In Kelley the court held that it was an abuse of judicial discretion to not grant severance with respect to one co-defendant. However, Kelley is distinguishable because the circumstance involved a lengthy trial where the defendant's name was not even mentioned for more than three months, defendant's illness caused several delays which the jury regarded as malingering, and much of the evidence was applicable solely to the co-defendants.

In contrast, the facts of the present case do not rise to the same level of "spillover" effect which was apparent in Kelley. While there was some evidence introduced which pertained only to Steve Penson, the trial court carefully cautioned the jury concerning the use of such evidence. (Tr. 183-184, 684-685). The Kelley court specifically noted that cautionary instructions to the jury was one of the safeguards against the use of prejudicial evidence to one defendant. Id. at 756-757.

Furthermore, appellant's claim that there was minimal evidence against him is discounted by a review of the record. Much of the evidence presented was applicable to all three defendants and supported appellant's participation in the crimes alleged in the indictment. Although one of the victims could not identify appellant, the other victim's testimony was sufficient to support identification beyond a reasonable doubt.

Appellant's first assignment of error is overruled.

II. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO SYSTEMATICALLY USE PEREMPTORY CHALLENGES TO ELIMINATE BLACK PERSONS FROM THE JURY PANEL IN VIOLATION OF APPELLANT'S RIGHTS TO EQUAL PROTECTION OF LAWS AND TRIAL BY A REPRESENTATIVE JURY.

Appellant contends that the court erred in failing to require the prosecutor to come forward with a race-neutral explanation for challenging black jurors peremptorily. He claims he established a prima facie showing of the systematic exclusion of blacks from the jury.

In the recent United States Supreme Court case of Batson v. Kentucky (1986), 106 S. Ct. 1712, the court reaffirmed that the equal protection clause forbids prosecutors from challenging potential jurors solely on account of their race or on the assumption that black jurors, as a group, will be unable to impartially consider the state's case against a black defendant. The court re-evaluated its position with respect to the requirements of establishing a prima facie showing of discrimination. The court overruled the earlier standard first formulated in Swain v. Alabama (1965), 380 U.S. 202, which required a defendant to demonstrate a systematic pattern of exclusion in a number of cases. The Supreme Court in Batson specifically stated that a defendant may make a prima facie showing of purposeful racial discrimination in the selection of the jury by relying solely on the facts of his case concerning the prosecutor's exercise of peremptory challenges, Id. at 1722-23. Once a prima facie showing of purposeful discrimination has been made, the burden shifts to the State to come forward with a race-neutral explanation for peremptorily challenging black jurors. In order to make out a prima facie case under Batson, (1) Defendant must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges in order to remove from the venire members of defendant's race, (2) Defendant is entitled to rely upon the fact that peremptory challenges constitute a jury selection practice that permits

those to discriminate who are of a mind to discriminate, and (3) Defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude veniremen from the petit jury on account of their race. Id. In determining whether defendant has made the requisite showing the trial court should consider all the relevant factors. Although the court did not fully elaborate on what circumstances are relevant, it did mention that a "pattern" of challenges or statements made during voir dire may be indicative of a discriminatory purpose. Batson, supra at 1723.

The Batson decision was accorded retroactive effect in all state and federal cases pending on direct appeal or not yet final in the Supreme Court's recent decision in Griffith v. Kentucky (U.S. January 13, 1987) 55 U.S.L.W. 4089.

Before reaching the merits of whether appellant established a prima facie case, we must consider the timeliness of appellant's challenge to the make up of the jury.

In Batson, supra, the court considered petitioner's objection to the prosecutor's removal of blacks from the jury timely because it was made before the jury was sworn. See also, State v. Neil (Fla. 1984), 457 So. 2d 481; Commonwealth v. DiMatteo (Mass. App. 1981), 427 N.E. 2d 754; People v. Payne (Ill. 1983), 457 N.E. 2d 1202; People v. Pagel (Cal. Super. 1986), 232 Cal. Rptr. 107.

In the present action, appellant's objection to the prosecutor's use of peremptory challenges was not made until after he expressed his satisfaction with the jury and the jurors were sworn. The transcript reveals the following colloquy,

> THE COURT: Mr. Schwarz, I think we are back to you.
>
> MR. SCHWARZ: We are satisfied with the jury as seated. Thank you.
>
> THE COURT: Mr. Seeberger;
>
> MR. SEEBERGER: We are satisified with the jury as it is.
>
> THE COURT: Thank you. We have a jury, ma'am.
>
> FOLLOWING THE OATH OF THE JURY:
>
> THE COURT: I suspect we should select two alternates but before we do that, anyone in here need a recess. Let's take a short recess.
>
> • • •
>
> IN CHAMBERS:
>
> MR. RAB: On behalf of Defendant Smith, I wish to challenge the venire on the grounds that of all the prospective jurors that we had there were only two blacks on it and they were both seated and both challenged by the prosecutor and thereby denying this defendant representation of his own race on the jury and denying him the right to trial by jury by all of his peers and there has been in my opinion, a systematic exclusion of blacks on the jury.
>
> MR. SCHWARZ: I would join in that motion and add that the jurors who were on the jury list that I had out there were a hundred and one jurors on that list and we have only been through about forty or forty-five of that but I don't know of any other black jurors and there were numerous absences for no reason that I

know of other than they just didn't show up. I don't know the reason for exclusions and that is not within our ability to find out. We would join him in that we feel a person is not getting a fair trial by his appearance.

MR. RAB: I would join him in that.

MR. MONTA: On behalf of Defendant Penson, we would join in the original motion and the amended motion for the record and indicate that the racial make up of the jury is entirely non negroid and the defendants, for the record, are all negroes.

MR. SEEBERGER: Giving racial qualifications, not a color.

MR. DODSWORTH: So are all the victims.

* * *

MR. DODSWORTH: Well, whether or not we preempt one way or another, it has nothing to do with challenge to race. Jurors are selected in the usual way by the jury commission and challenge to the array goes to the jury rather than to the people coming in here. We had many, many people. The courtroom was full according to the document that we have, was well in excess of a hundred who we called. So, unless there is some law that I don't know, some recent development in the law that I am now aware of, I think --

THE COURT: This rule 24(E), last sentence of the first paragraph, a challenge to the array should be made before examining of a jury pursuant to subdivision A and should be tried by the court. The court would overrule the challenge for two reasons, namely, not made before the examination of the jury on the voir dire examination and secondly, we have no evidence of any systematic exclusion.

We find appellant's objection to the prosecutor's use of peremptory challenges to have been untimely, in light of the fact that the jury had been sworn. At that point in the

progression of the trial, it was too late to enable the court to notice and correct any error. At the very latest, the issue should have been raised before the jury was sworn. Moreover, we consider the better approach is to render an objection contemporaneous with the exercise of a peremptory challenge. The requirement of a contemporaneous objection is based upon practical necessity and basic fairness in the operation of a judicial system. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

In light of the foregoing, we need not consider whether appellant established a prima facie case. Appellant's second assignment of error is overruled.

III. THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN OVERRULING HIS MOTION AT THE END OF THE STATE'S CASE TO DISMISS THE FIREARM SPECIFICAITON TO THE INDICTMENT AND IN SENTENCING APPELLANT TO A THREE-YEAR TERM OF ACTUAL INCARCERATION WHEN THE STATE FAILED TO PROVE APPELLANT POSSESSED A FIREARM AS DEFINED IN R.C. 2923.11(A) AND (B).

Appellant contends the state produced insufficient evidence to convict him of a firearm specification under R.C. 2929.71(A). He argues the correct standard to be applied is set forth in State v. Boyce (1985), 21 Ohio App. 3d 153.

This court has had occasion to address the precise issue presented in State v. Jinks (May 6, 1986) Greene App. No. 85-CA-10, unreported. In Jinks, we declined to adopt the reasoning set forth in Boyce and instead followed State v.

Vasquez (1984), 18 Ohio App. 3d 92 wherein the court held that there is no good reason to require a higher degree of proof of a "firearm" than the Supreme Court has required for a "deadly weapon." Id. at 94. A jury may infer from the evidence presented that the gun was capable of firing.

In the present action, sufficient evidence was introduced to enable the jury to reasonably infer that appellant used a firearm during the rapes and robbery. There was testimony describing the gun, (Tr. 306-307) and the method and manner of its use by appellant (Tr. 207, 209, 212, 251). The victims also testified as to appellant's threats to blow various parts of their bodies off. (Tr. 251, 209, 212).

The jury could logically infer from the appellant's own actions that the gun was capable of firing. Appellant's third assignment of error is overruled.

IV. THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN INSTRUCTING THE JURY ON THE ISSUE OF COMPLICITY WHICH INSTRUCTION INVITED AND URGED THE JURY TO RETURN A GUILTY VERDICT.

Appellant contends that the trial court's instruction on complicity, in effect, directed the jury to return a guilty verdict against one of the defendants and then decide whether either of the other two aided and abetted the principal. The court instructed the jury as follows,

> When you consider each count of the indictment that charges that all three defendants committed it, consider which of the defendants was the actual participant in committing the offense, then consider if each of the other two aided and abetted the actual participant in

> committing the offense, with the same degree of culpability required to commit the offense, that is, with purpose or knowingly. (Tr. 676-677).

Prior to closing arguments, appellant's counsel joined in a specific objection to the aiding and abetting instruction (Tr. 600). The objection was renewed after the jury was charged. (Tr. 695).

Generally, a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. State v. Price (1979), 60 Ohio St. 2d 146, State v. Simms (1983), 9 Ohio App. 3d 302.

While the trial court's instruction deviated slightly from the standard complicity instruction set forth in 4 Ohio Jury Instructions (1987) 339, Section 523.03, we cannot conclude that the instructions, read as a whole, urged the jury to return a guilty verdict. In addition to the complicity charge, the court also gave the standard instructions on the presumption of innocence, reasonable doubt, and separate consideration of the evidence against each defendant. (Tr. 673, 685-87). Furthermore, appellant has failed to demonstrate how the instruction prejudiced him specifically, as opposed to any of the other defendants.

We find no merit to appellant's fourth assignment of error.

V. THE TRIAL COURT ERRED IN ENTERING A JUDGMENT OF CONVICTION ON TWO COUNTS OF FELONIOUS ASSAULT WHEN THE JURY WAS INSTRUCTED ON THE ELEMENTS OF MISDEMEANOR ASSAULT.

Appellant was charged in counts five and six of the indictment with having knowingly caused physical harm to James and Deborah Jones by means of a deadly weapon. R.C. 2903.11(A)(2). Yet, when the court instructed the jury on the elements of felonious assault, it failed to include all the elements of the offense. The instruction at transcript page 683 went as follows,

> Each defendant is charged with two counts of felonious assault, one on James Jones and one on Deborah Jones. Before you can find a defendant guilty of felonious assault, you must find beyond a reasonable doubt that on or about the 4th day of August, 1984, and in Montgomery County, Ohio, the defendant knowingly caused physical harm to James Jones or in the other count, Deborah Jones, or aided or abetted their co-defendant in the commission of either or both offenses.

The court's instruction was clearly erroneous as it included only the elements required to prove simple assault under R.C. 2903.13(A). However, the record reflects that no objection was made to the instruction in accordance with Crim. R. 30. Absent plain error, failure to object to a jury instruction constitutes a waiver of the issue on appeal. State v. Underwood (1983), 3 Ohio St. 3d 12. Plain error is an obvious error which is prejudicial to the accused, although neither objected to nor affirmatively waived, which if allowed to stand, would have a substantial adverse impact on the integrity of and public confidence in judicial proceedings. State v. Stover (1982), 8 Ohio App. 3d 179, State v. Craft (1977), 52 Ohio App. 2d 1. To rise to the level of plain

error, it must appear on the face of the record not only that the error was committed, but that except for the error, the result of the trial clearly would have been otherwise. State v. Bock (1984), 16 Ohio app. 3d 146, State v. Cooperrider (1983), 4 Ohio St. 3d 226.

In State v. Adams (1980), 62 Ohio St. 3d 151, the Supreme Court stated that the failure to separately and specifically instruct the jury on every essential element of the crime charged is not per se plain error. See also, State v. Long (1978), 53 Ohio St. 2d 91. A reviewing court must examine the record to determine the probable impact of the court's failure to charge an element of the offense and consider whether substantial prejudice may have been visited on the defendant. Adams, supra at 154.

With regard to count five involving James Jones, the state introduced the testimony of several witnesses to demonstrate that he had suffered physical harm as a result of being hit with the gun. James testified that appellant and Steve Penson hit him repeatedly with the pistol about the head and body. (Tr. 208, 211, 212, 214). Deborah Jones testified that she saw James being hit with the gun and that he was bleeding from the head. (Tr. 490, 492). Dr. Terraro testified that James had multiple lacerations on his head and face which required 36 stitches. (Tr. 458). He stated that the injuries were consistent with James' claim that he had been beaten with a gun. (Tr. 458).

The appellant presented no evidence to contradict or refute the testimony inasmuch as the theory of defense presented by all of the defendants was that they were not the persons who committed the acts. In finding appellant guilty on count five, the jury necessarily rejected the proffered defense and believed beyond a reasonable doubt that appellant caused physical harm to James Jones by means of a deadly weapon. We cannot find that, except for the error, the outcome of the jury's decision on this count clearly would have been otherwise.

With regard to count six concerning Deborah Jones, the record is devoid of any evidence that she suffered physical harm by means of a deadly weapon. The only two references in the record which lend any support to the felonious assault charge are at pages 489 and 494 of the transcript,

> A. Yes. He had a gun up to my head now and I was sitting on top of the fat one.
>
> OK, well, he came back and then he had the gun to my head and he had his penis in my butt and the other one had his penis in my vagina at the same time and -- (crying)
>
> . . .
>
> Q. Were you face up or face down?
>
> A. No, I was laying sideways cause I could feel the pressure of the gun through the pillow, like in my face.

This evidence alone, as a matter of law, was insufficient to support the finding that appellant committed felonious assault against Ms. Jones. The outcome of the trial may clearly have been different had the court properly charged the

jury. Accordingly, we must reverse appellant's conviction on count six of the indictment. Appellant's assignment of error is overruled in part and sustained in part.

VI. THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN OVERRULING OBJECTIONABLE STATEMENTS BY THE PROSECUTOR IN HIS FINAL ARGUMENT AND FAILING TO INSTRUCT THE JURY TO DISREGARD SAME.

Appellant's final argument claims the court erred in allowing the prosecutor to comment on the failure of a criminal defendant to produce a witness at trial.

Initially, the record reflects that the prosecutor's remarks was directed to co-defendant Penson's failure to produce an alibi witness and did not mention appellant. Furthermore, appellant's counsel did not make any objection to the statement.

Notwithstanding our above concerns, this court recently held in State v. Walton (May 11, 1987) Clark App. No. 2241, unreported, that Crim. R. 16(C)(3) was never designed to prohibit fair comment on the absent witness who could fairly be expected to testify for one side or the other. See also, State v. Foster (1982), 8 Ohio App. 3d 338. There is no evidence in the present case that the appellant provided discovery to the state by way of a list of potential witnesses. As such Crim. R. 16(C)(3) was not implicated.

The prosecutor's comment was within the common sense of familiar experiences in the every day life and was not

forbidden by any law as the proper subject of comment. See, State v. Champion (1924), 109 Ohio St. 281, 289-90. We do not find that the prosecutor's remarks were prejudicial. Appellant's sixth assignment of error is overruled.

In light of the foregoing, we hereby vacate the judgment and sentence imposed on count six. The remainder of appellant's arguments are not well taken. In accordance with App. R. 12(B), the judgment of the trial court is affirmed, as modified.

.....

WILSON, J., concurs.

FAIN, J., dissenting in part and concurring in part:

With respect to the fourth assignment of error, I dissent. I would sustain the fourth assignment of error.

The instruction objected to is as follows:

> When you consider each count of the indictment that charges that all three defendants committed it, consider which of the defendants was the actual participant in committing the offense, then consider if each of the other two aided and abetted the actual participant in committing the offense, with the same degree of culpability required to commit the offense, that is, with purpose or knowingly. (Tr. 676-677, emphasis added.)

Counsel interposed a timely objection to this instruction, including as grounds for the objection that it invited a conviction by its language. Tr. 600. The objection was renewed after the jury was fully instructed. Tr. 695.

The emphasized language in the instruction assumes that at least one of the defendants committed the offense.

> *** In criminal trials before juries, the court's participation must be scrupulously limited lest it consciously or unconsciously indicate an opinion on the evidence or on the credibility of a witness to the jury.
>
> Statements made by a trial judge during the progress of a trial and within hearing of the jury are of the same effect as though embodied in the charge to the jury, and, where such remarks or questioning may lend themselves to being interpreted as an opinion on the part of the judge as to the credibility of witnesses or of a defendant or an opinion on his part as to the facts of the case, prejudicial error results. State v. Kay (1967), 12 Ohio App. 2d 38, 49.

See, also, State v. Sutton (1968), 7 Ohio App. 2d 178; Zimmerman v. State (1932), 42 Ohio App. 407.

To be sure, the trial court's general instructions to the jury in this case properly covered the respective provinces of the judge and the jury, and the fact that each defendant was entitled to a presumption of innocence. Nevertheless, the susceptibility of a jury to any suggestion by the judge, consciously or unconsciously, as to the guilt of the accused is great, given the respective roles of jury and judge. Accordingly, any instruction that assumes the guilt of the defendants, or at least one of them, runs a serious risk of being perceived by the jury, consciously or unconsciously, as a signal that the judge has concluded that the defendants, or at least one of them, are guilty.

While the evidence in this case was sufficient to sustain the defendant's conviction, his identification by the victims was disputed, and I cannot conclude that the evidence against him was so overwhelming as to cause the suggestion of guilt contained in the instruction to have been harmless.

I would sustain the fourth assignment of error, reverse the defendant's convictions, and remand for a new trial.

With respect to the second assignment of error, I would join in overruling it, but my reasoning differs somewhat from that of my colleagues.

I am not persuaded that an attack upon a prosecutor's use of peremptory challenges, based on Batson v. Kentucky (1986), 106 S. Ct. 1712, should be barred as untimely simply because the prospective jury was sworn following an expression of satisfaction with the jury by defense counsel. Where there is nothing in the record to reflect either any prejudice to the state or the creation of any additional practical difficulties as a result of the prospective jury having been sworn and the brief interval between the defense counsel's expression of satisfaction with the jury and his subsequent Batson attack upon the composition of the jury, I would not deem as waived such an important right as the defendant's right to be tried by a jury from which members of his race have not been purposely

excluded.[1]

In this case, however, the objection to the composition of the jury was based primarily upon the racial composition of the entire array (as containing only two Black persons), as exacerbated by the fact that the only two Black members of the array were peremptorily challenged by the prosecution, leaving an all-White jury. The trial judge in overruling the defendants' objections, characterized them as a challenge to the array. See the portion of the trial transcript quoted at pages 9 and 10 of this Court's opinion. The trial court overruled the challenge to the array upon the grounds that: (i) it was not timely made pursuant to Crim. R. 24(E), and (ii) there was no evidence of systematic exclusion. The trial court's holding that the challenge to the array was not timely in accordance with the Rule was correct in view of the fact that the trial court had proceeded with the voir dire examination of the jury.

The defendant's objection was susceptible of being interpreted as a challenge primarily to the array, fortified by

---

[1] Perhaps a better argument can be made that the defense counsel's failure to object as each peremptory challenge is made should be deemed to constitute a waiver of the defendant's Batson rights in view of the usual practice of excusing a prospective juror from the courthouse just as soon as the prospective juror is the subject of a peremptory challenge, thereby making it at least inconvenient, if not impractical, to recall the prospective juror in the event that a Batson objection is sustained. The difficulty with this approach is that it deprives the defendant of the opportunity to assess, and to argue from the standpoint of, the prosecution s overall pattern and practice in the exercise of peremptory challenges during voir dire.

the fact that the only two Blacks in the array had fallen victim to prosecutorial peremptory challenges. Had the defendant intended his objection to be taken as an objection to the propriety of the prosecution's exercise of its peremptory challenges, separately and independently from his challenge to the array, then, given that the objection was susceptible of a contrary interpretation, the defendant had a duty to let the trial judge know that he had misinterpreted the objection as being directed solely to the array. Since the defendant did not do so, he cannot now be heard to complain that the trial judge misunderstood his objection.

Accordingly, I join in overruling the second assignment of error.

With respect to the first, third, fifth and sixth assignments of error, I concur fully in this Court's opinion.

While I concur in the judgment of this Court to the extent that it vacates the judgment and sentence imposed with respect to count six, I respectfuly dissent from that judgment to the extent that it affirms the other convictions. I would reverse and remand for a new trial.

* * * * * * * * *

Copies mailed to:

Mark B. Robinette
D.K. Wehner
Hon. W. Erwin Kilpatrick

APPENDIX "E"

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee :
vs. : CASE NO. 9168
JOHN A. SMITH, JR. :
Defendant-Appellant :

.....

O P I N I O N

Rendered on the 13th day of May, 1987

.....

LEE C. FALKE, Prosecuting Attorney for Montgomery County, Ohio,
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Attorney for Defendant-Appellant

.....

BROGAN, J.

On August 4, 1984 James Jones, his wife, Deborah Jones and their two sons were residing at 1947 Fairport Avenue Apartment 104 in Montgomery County. Also living at that address was James' sister, Mary Jones and her son.

Sometime after 12:30 a.m. that morning, Steve Penson broke through the bedroom window of the apartment wielding a pistol. Penson demanded money and began searching James' jacket. At the same time, two other men, identified as Richard Brooks and John Albert Smith, Jr. kicked in the front door of the

apartment and came inside. Over the course of approximately the next one to two and one-half hours the men sexually assaulted, sodomized, and brutalized the adult residents. Before leaving, the men also took several items from the apartment. Brooks was told to kill Deborah and James but, was unable to do so and left the apartment after telling them to count to 2000.

After the assailants left, James Jones went upstairs to a neighbor's apartment and called the police. The parties were thereafter taken to Good Samaritan Hospital for medical treatment.

On August 10, 1984, the Montgomery County Grand Jury indicted defendant Smith on one count of rape, with a firearm specification. On August 14, 1984 defendant was indicted on twenty additional counts of rape; one count of aggravated burglary; two counts of aggravated robbery; two counts of felonious assault; one count of felonious sexual penetration; and one count of gross sexual imposition. Each of the above counts contained a firearm specification.

Defendant was tried jointly with co-defendants Penson and Brooks before a jury on November 26 through December 5, 1984. On December 7, 1984, the jury returned verdicts finding defendant guilty on fourteen counts of Rape (Count One, Counts Ten through Seventeen, and Counts Twenty-Two through Twenty-Six) with firearm specifications on each count; guilty of Aggravated Burglary (Count Two) with a firearm specification;

guilty of two counts of Aggravated Robbery (Counts Three and Four) with firearm specifications on each count; guilty of two counts of Felonious Assault (Counts Five and Six) with firearm specifications on each count; guilty of Attempted Rape (Count Eight) with a firearm specification; and guilty of Gross Sexual Imposition (Count Nine) with a firearm specification. On December 27, 1984, the trial court filed an Entry and Order sentencing defendant to the Chillicothe Correctional Institute for a term of 10 to 25 years on Counts One though Four, Counts Ten through Seventeen, and Counts Twenty-Two through Twenty-Six, to be served concurrently with each other; with an additional term of 3 years actual incarceration on Count Two for the firearm specification; a term of 5 to 15 years on Counts Five and Six to be served concurrently with each other and consecutively with Count Two; a term of 8 to 15 years on Count Eight to be served concurrently with all other counts; and a term of 18 months on Count Nine to be served concurrently with all other counts. All sentences pertaining to the rape offenses were designated as actual incarceration and the 3 year term of actual incarceration for the firearm specification was ordered to be served consecutively with and prior to all other terms of imprisonment.

Defendant filed a timely notice of appeal on December 21, 1984. Defendant-appellant asserts three assignments of error on appeal.

Appellant's first assignment of error states,

THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY ON THE POTENTIAL UNRELIABILITY OF EYEWITNESS IDENTIFICATION TESTIMONY WHERE SUCH AN INSTRUCTION WOULD HAVE ASSISTED THE JURY IN DETERMINING THE ESSENTIAL FACTUAL ISSUE IN THE CASE.

Appellant contends the trial court erred in failing to give a special instruction on identification testimony in accordance with U.S. v. Telfaire (C.A.D.C. 1972), 469 F. 2d 552. In a criminal case, if requested special instructions are correct, pertinent, and timely presented, they must be included, at least in substance, in the general charge. Cincinnati v. Epperson (1969), 20 Ohio St. 2d 59.

Crim. R. 30(A) provides:

> (A) Instructions; error; record. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies of such requests shall be furnished to all other parties at the time of making such requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. The court need not reduce its instructions to writing.
>
> A party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Failure to properly request an instruction in writing results in a waiver of a defendant's right to have such instruction given to the jury. State v. Fanning (1982), 1 Ohio St. 3d 19.

A review of the record in the present action reveals that appellant's trial counsel never requested a Telfaire instruction nor registered any objection with the court's charge to the jury. Appellant has therefore waived any argument with respect to the first assignment of error unless, the failure to give the instruction amounted to plain error.

Plain error is an obvious error which is prejudicial to the accused, although neither objected to nor affirmatively waived, which if allowed to stand, would have a substantial adverse impact on the integrity of and public confidence in judicial proceedings. State v. Stover (1982), 8 Ohio App. 3d 179, State v. Craft (1977), 52 Ohio App. 2d 1. To rise to the level of plain error, it must appear on the face of the record not only that the error was committed, but that except for the error, the result of the trial clearly would have been otherwise. State v. Bock (1984), 16 Ohio App. 3d 146, State v. Cooperrider (1983), 4 Ohio St. 3d 226.

An examination of the record reveals that the facts did not contain many of the infirmities often associated with eyewitness identification. James Jones, who was familiar with Steve Penson, Richard Brooks and John Smith, testified that he was 100% positive tht they were the men in his apartment on August 4, 1984. (Tr. 218-19). Deborah Jones testified that she had known Steve Penson before the incident but, had never seen Brooks or Smith. Yet, she unequivocally identified all three suspects in court. (Tr. 483, 485, 510). Mary Jones was

able to positively identify Smith and Penson in court (Tr. 397).

All of the victims testified that the lighting conditions were adequate and that they had ample opportunity to view the defendants during the course of the rapes and burglaries on August 4, 1984.

There was sufficient evidence presented to enable the jury to determine identity beyond a reasonable doubt. We cannot find that the outcome of the case would clearly have been different, had the court given a Telfaire instruction.

Appellant's first assignment of error is overruled.

Appellant's second assignment of error states that the trial court erred in refusing to grant separate trials for the co-defendants. Appellant's counsel filed a motion for separate trials on October 12, 1984 claiming that a co-defendant had made a statement which implicated appellant and that the multiple counts would confuse the jury.

Revised Code section 2945.13 provides,

> When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly unless the court, for good cause shown on application therefor by the prosecuting attorney or one or more of said defendants, orders one or more of said defendants to be tried separately.

The burden is upon the applicant seeking a separate trial to show good cause why a separate trial should be granted. State v. Perod (1968), 15 Ohio App. 2d 115. The granting or denial of such separate trial rests within the sound discretion of

the trial court. State v. Dingus (1970), 26 Ohio App. 2d 131. Mere hostility between defendants is not enough to necessitate separate trials. State v. Morris (Sept. 29, 1982), Lorain App. No. 3332, unreported.

Appellant contends that because the defendants were charged collectively with 84 counts of criminal activity, the jury couldn't help but be confused over the issues. Appellant claims such confusion clearly resulted in prejudice, although he fails to exemplify specifically what prejudice occurred.

Our review of the record reveals that the trial court acted within the parameters of sound discretion when it overruled the motion for separate trials. Preliminarily, we note that appellant failed to renew his motion to sever at the close of the state's case or at the conclusion of all the evidence. At least one Ohio appellate court has ruled that a failure to renew a motion for severance constitutes a waiver of the issue on appeal. State v. Owens (1975), 51 Ohio App. 2d 132, 146. We however, find it unnecessary to determine this issue because the record does not demonstrate that appellant met his burden of showing good cause why a separate trial should be granted.

Initially we must examine whether this case presents a problem identified in Bruton v. United States (1968), 391 U.S. 123, where the United States Supreme Court held that it was a violation of the right to cross-examine guaranteed by the Confrontation Clause of the Sixth Amendment to introduce at a

joint trial, extra-judicial statements made by a defendant who did not take the stand when these statements incriminated a co-defendant. See also, State v. Moritz (1980), 63 Ohio St. 2d 150. The case at hand is distinguishable from Bruton in several important respects.

Here, all three defendants took the stand and expressly denied any involvement in the crimes. Each claimed he was somewhere else on the night of August 4, 1984. Thus, the blame-shifting which occurred in Bruton, supra did not take place in this case. Also, unlike the defendant in Bruton, appellant here had the opportunity to cross-examine his co-defendant.

Appellant's claim that the jury was unable to segregrate the evidence is additionally belied by our examination of the evidence. The evidence relative to the various charges was direct and uncomplicated. See, State v. Roberts (1980), 62 Ohio St. 2d 170. Furthermore, the jury's ability to evaluate the individual proof on each charge is evidenced by the fact that they acquitted appellant on six counts of the indictment.

Accordingly, we find appellant's second assignment of error is not well taken.

Appellant's third assignment of error claims the trial court erred in failing to suppress identification testimony prior to trial. Appellant's counsel filed a motion to suppress identification testimony on September 19, 1984. A hearing on the motion was held on October 9 and 10, 1984.

However, after the hearing but, before the court rendered a decision regarding the identification testimony, appellant's counsel withdrew the September 19, 1984 motion.

It is a well established principal that an appellate court has no authority to consider claims of error not called to the trial court's attention. See, State v. Mathis (1984), 16 Ohio App. 3d 13. Although appellant brought the matter to the trial court's attention, he subsequently abandoned his claims before the court ruled. Appellant cannot now assert error in the court's actions when he, of his own motion, had withdrawn the issue from the court's consideration. The court, therefore, did not err in overruling the motion. Appellant's third assignment of error is overruled.

In light of the foregoing, appellant's third assignment of error is overruled. The judgment of the trial court is affirmed.

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WOLFF, J., and FAIN, J., concur.

Copies mailed to:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief In Opposition To Petition For Writ Of Certiorari To The Ohio Supreme Court, was sent to Counsel of Record for Petitioner by depositing said document in the United States mail with first-class postage prepaid to: Gregory L. Ayers, Ohio Public Defender Commission, Eight East Long Street, 11th Floor, Columbus, Ohio 43266-0587.

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